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2011

## Remarks by Acting Solicitor General Neal Katyal

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99 Geo. L.J. 1317 (2010-2011)

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# Remarks by Acting Solicitor General Neal Katyal

NEAL KATYAL\*

It is a pleasure to be here today, to return to Georgetown, and to participate in this extraordinary event honoring one of our nation's leading jurists, Justice John Paul Stevens. Few have served the public with greater distinction. That service began, of course, with Justice Stevens's work as a naval intelligence officer during World War II, continued through his five years of service as a judge on the Seventh Circuit, and culminated with thirty-four and a half years on the United States Supreme Court. It also included a twenty-six-day stint in September 2005, during which Justice Stevens served as the Acting Chief Justice of the United States. I, for one, can attest to how important an Acting role can be. For that, and for many other reasons, I'm honored to have the opportunity to provide my thoughts today.

I want to begin by thanking the Justice for his service to our country and the Court, for his intellect, for his willingness to fight for ordinary people, and most of all, for his fundamental decency. I can't tell you how difficult it is to have your first argument before the Supreme Court. But to have Justice Stevens say "Counsel, may I ask you a question," in just such a decent way, is so helpful to the first-time advocate. I see Justice Stevens's legacy daily now in the Solicitor General's Office. Our Acting Principal Deputy Leondra Kruger, his former clerk, reflects many of the qualities that make Justice Stevens who he is. And I see it with other former clerks, some of whom I see in front of me today. People like Jeff Fisher, and Deborah Pearlstein—incredible, extraordinary people that Justice Stevens has mentored and has given to this nation.

It would be impossible to adequately summarize Justice Stevens's jurisprudence in twenty minutes—it spans the gamut from antitrust to administrative law to the constitutional rights of criminal defendants. So rather than try to survey those contributions, I thought I'd focus my Remarks today on the Justice's contributions in just one area: the ethical responsibilities of prosecuting attorneys. I chose this subject for two reasons. First, the professional responsibilities of government lawyers are of central importance to the institution in which I work right now, the Department of Justice. Justice Stevens's work has had a profound impact on the way that the Department conducts its business. Second, I hope to demonstrate that Justice Stevens's jurisprudence in this area reflects many of the qualities for which he is so well known: a deep concern for fairness, an abiding respect for the coordinate branches of government, a keen interest in the integrity, both real and perceived, of the process by

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which important decisions are made, and a nuanced, fact-based approach to legal problem solving. To show you what I mean, I'll briefly describe three cases, one from each of the Justice's first three decades on the Court.

The first case is *United States v. Agurs*.<sup>1</sup> It was decided in June 1976, just six months after Justice Stevens joined the Court, and thirteen years after the Court issued its opinion in *Brady v. Maryland*. *Brady*, of course, held that prosecutors have a constitutional duty to turn over to the accused material evidence requested by defendant's counsel.<sup>2</sup> The *Agurs* case concerned a murder trial in which the prosecution failed to disclose to the defendant evidence of the victim's criminal record. The evidence revealed that the victim had previously pleaded guilty to one count of assault and two counts of carrying a deadly weapon. *Agurs* contended that, had this information been made available to her, it would have supported her argument that she acted in self-defense after the victim initiated the attack that led to his demise.<sup>3</sup>

There was one complicating factor, however. Unlike the defense in *Brady*, *Agurs*'s attorney had failed to request the victim's criminal record.<sup>4</sup> The question in the case was whether that made a difference.<sup>5</sup> Writing for the Court, Justice Stevens began in characteristic fashion by stating that the answer would depend on "a review of the facts."<sup>6</sup> And after describing the facts in detail, he laid out a three-tiered framework for *Brady*'s applications.<sup>7</sup>

The first tier involved situations in which the undisclosed evidence demonstrated that the prosecution's case "include[d] perjured testimony and that the prosecution knew, or should have known, of the perjury."<sup>8</sup> In those cases the use of perjured testimony, Justice Stevens said, would be "fundamentally unfair" and "a corruption of the truth-seeking function."<sup>9</sup> Justice Stevens wrote that for those cases a "strict standard of materiality" was required.<sup>10</sup> Evidence was material in those cases if it had "any reasonable likelihood" of affecting the jury's judgment.<sup>11</sup>

Next, Justice Stevens described the second tier: cases in which prosecution withheld evidence that the defense had specifically requested. That was the situation in *Brady*.<sup>12</sup> Relying on *Brady*, Justice Stevens said that evidence specifically requested and intentionally withheld was material if it "might have

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1. *United States v. Agurs*, 427 U.S. 97 (1976).

2. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

3. *Agurs*, 427 U.S. at 100-01.

4. *Id.* at 101.

5. *Id.* at 102.

6. *Id.* at 99.

7. *Id.* at 99-101, 103.

8. *Id.* at 103.

9. *Id.* at 103-04.

10. *Id.* at 104.

11. *Id.* at 103.

12. *Id.* at 104.

affected the outcome of the trial.”<sup>13</sup> According to Justice Stevens, when “the prosecutor receives a specific and relevant request, the failure . . . is seldom, if ever, excusable.”<sup>14</sup>

Finally, he set forth the third tier: the standard that applies when the prosecution fails to provide exculpatory evidence that the defense has not specifically requested, perhaps because the defense is not aware that it exists.<sup>15</sup> In those cases, Justice Stevens said the omitted evidence is material and must be disclosed if it “creates a reasonable doubt that did not otherwise exist.”<sup>16</sup> In his view, this standard, while less favorable than the standard in tiers one and two, reflected the Court’s “overriding concern with the justice of the finding of guilt.”<sup>17</sup> It did so, Justice Stevens said, because it took into account the unique role of the “attorney for the sovereign,” who must both “prosecute the accused with earnestness and vigor,” and remain “faithful to his client’s overriding interest that justice . . . be done.”<sup>18</sup> Applying that third standard to the case before him, Justice Stevens found that the prosecutor’s failure to provide evidence hadn’t deprived Agurs of due process because the victim’s criminal record was cumulative of other evidence already introduced at trial.<sup>19</sup>

Nine years later, the Court revisited *Agurs* in a second case, *United States v. Bagley*.<sup>20</sup> There, the defendant maintained that he had been denied a fair trial because the government had failed to disclose its payment of a monetary reward to its two principal witnesses for their testimony, despite a pretrial request from defendant’s counsel.<sup>21</sup> The Court did not ultimately decide whether the prosecution’s withholding of the requested evidence violated the defendant’s rights. Instead, it introduced a new standard for evaluating the materiality of undisclosed evidence and remanded the case.<sup>22</sup> Under that new standard, “[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>23</sup> According to the Court, the new standard rendered obsolete the *Agurs* three-part framework.<sup>24</sup>

Justice Stevens vigorously dissented. He argued that the new reasonable probability standard appeared to “include an independent weight in favor of affirming convictions despite evidentiary suppression” because “[e]vidence favorable to an accused and relevant to the dispositive issue of guilt apparently may

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13. *Id.*

14. *Id.* at 106.

15. *Id.*

16. *Id.* at 112.

17. *Id.*

18. *Id.* at 110–12 (internal quotation marks omitted).

19. *Id.* at 114.

20. *United States v. Bagley*, 473 U.S. 667 (1985).

21. *Id.* at 670–72.

22. *Id.* at 682, 684.

23. *Id.* at 682.

24. *Id.*

still be found not 'material.'"<sup>25</sup> Quoting Justice Marshall, he expressed concern that the standard would provide prosecutors with an incentive "to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive."<sup>26</sup>

The nondisclosure of evidence was also at issue in the third case, a habeas case called *Kyles v. Whitley*.<sup>27</sup> In the state prosecution at issue in *Kyles*, the government had failed to disclose exculpatory information, including witness statements and other evidence that raised doubts about the identity of the defendant as the perpetrator of the crime.<sup>28</sup> After an exhaustive review of the record, Justice Souter, writing for the majority, concluded that the undisclosed evidence "would have made a different result reasonably probable."<sup>29</sup> The Court therefore granted *Kyles's* habeas petition and ordered a new trial.<sup>30</sup>

Although Justice Stevens joined the majority in *Kyles*, he wrote a concurring opinion to respond to Justice Scalia's dissent,<sup>31</sup> According to Justice Scalia, because *Kyles's* habeas petition raised only a "fact-bound claim of error" rather than a legal one, the Court had no reason to grant certiorari to review the case.<sup>32</sup> Justice Stevens briefly and characteristically responded:

Our duty to administer justice occasionally requires busy judges to engage in a detailed review of the particular facts of a case, even though our labors may not provide posterity with a newly minted rule of law. The current popularity of capital punishment makes this 'generalizable principle' especially important. I wish such review were unnecessary, but I cannot agree that our position in the judicial hierarchy makes it inappropriate. Sometimes the performance of an unpleasant duty conveys a message more significant than even the most penetrating legal analysis.<sup>33</sup>

After the Court vacated *Kyles's* murder conviction, the state of Louisiana retried him three times. All three trials resulted in hung juries. In 1998, fourteen years after he had been first sentenced to death, *Kyles* walked out of prison.

I chose these three opinions not because I agree with them (for I have problems with each), but rather because I think they tell us at least three things about Justice Stevens's jurisprudence. But before I outline those three things, I should offer a caveat. As I was thinking about my Remarks today, I remembered that the very first question I received in a Supreme Court oral argument was a

25. *Id.* at 714 (Stevens, J., dissenting).

26. *Id.* (quoting *id.* at 701 (Marshall, J., dissenting)).

27. *Kyles v. Whitley*, 514 U.S. 419, 422 (1995).

28. *Id.* at 428-29.

29. *Id.* at 441.

30. *Id.* at 454.

31. *Id.* at 454-55 (Stevens, J., concurring) ("Because Justice Scalia so emphatically disagrees, I add this brief response to his criticism of the Court's decision to grant certiorari.")

32. *Id.* at 456 (Scalia, J., dissenting).

33. *Id.* at 455-56 (Stevens, J., concurring) (citations omitted).

question from Justice Stevens in *Hamdan v. Rumsfeld*.<sup>34</sup> It was a very nice question: Justice Stevens asked, “Counsel, where in the record can I find support for that proposition?” Since I’d memorized the record, I knew the answer. By contrast, I argued a case in March for the government, called *New Process Steel v. NLRB*, in which the question presented was whether the National Labor Relations Board could operate with only two members.<sup>35</sup> That day, Justice Stevens asked a very difficult question. Now that the decision in that case has been released, we know that I did a little better in the first case than the second one, so I don’t know if I’m on a downward trajectory in characterizing Justice Stevens’s jurisprudence. But I hope that my knowledge of him didn’t peak four years ago.

In any event, the first thing I will say is that the three cases I’ve outlined obviously demonstrate Justice Stevens’s unique view of justice. In this respect, these cases are not isolated—there are so many other cases that demonstrate that commitment as well. To take just one more example, in the 2004 case *Dretke v. Haley*, the majority held that the Fifth Circuit had improperly granted Haley’s habeas petition despite the fact that, by the state’s own admission, Haley had been erroneously sentenced to sixteen years for stealing a calculator from WalMart after two prior theft convictions—a crime that carried a maximum penalty of only two years.<sup>36</sup> In the majority’s view, the court of appeals should have considered alternative grounds for relief before granting Haley’s petition based on his argument that he was actually innocent of being a habitual felony offender.<sup>37</sup> The Court therefore vacated the Fifth Circuit’s decision and remanded.<sup>38</sup>

Justice Stevens wrote a characteristically eloquent dissent in which he noted that “[t]he unending search for symmetry in the law can cause judges to forget about justice.”<sup>39</sup> He emphasized that “[b]ecause, as all parties agree, there is no factual basis for respondent’s [sentence], it follows inexorably that respondent has been denied due process” and that the “miscarriage of justice is manifest.”<sup>40</sup> Justice Stevens attacked the majority for “los[ing] sight of the basic reason why the writ of habeas corpus indisputably holds an honored position in our jurisprudence,” to serve as a “bulwark against convictions that violate fundamental fairness.”<sup>41</sup> In Justice Stevens’s view, Haley was entitled to immediate relief.<sup>42</sup>

When I think about Justice Stevens’s tenure on the Court, particularly in light of cases like *Haley*, I think about our own practice in the Solicitor General’s

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34. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

35. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2638 (2010).

36. *Dretke v. Haley*, 541 U.S. 386, 389–92 (2004).

37. *Id.* at 388–89.

38. *Id.*

39. *Id.* at 396 (Stevens, J., dissenting).

40. *Id.* at 397–98.

41. *Id.* at 398–99 (internal quotation marks omitted).

42. *Id.* at 397.

Office of confessing error. A confession of error is when the SG says, "Actually, we shouldn't have won the case below. We got it wrong. Even though we prosecuted someone, we did so for an erroneous reason or in an erroneous way." This practice goes back all the way to the first Solicitors General; it spans Republican and Democratic administrations alike. The idea is that, as government lawyers, our job is to be faithful and provide our candor to the Court, but also to do justice. It's said that one SG, Frederick Lehmann, uttered the words that are right above the doors to the Attorney General's office today: "The United States wins its point whenever justice is done its citizens in the courts." He spoke those words when he signed his first confession of error.

Whether Justice Stevens voted with us or against us in an individual case, I think he is someone for whom Solicitor General Lehmann's words ring true. His devotion to the appropriate conduct of prosecuting attorneys will stand as a hallmark of his jurisprudence. But to view Justice Stevens's work as only concerned with one side—the criminal defense side—as some might characterize it, is to miss a second deep virtue of his approach to law, his respect for the coordinate branches of government. This aspect of his jurisprudence is most obviously demonstrated in a case we've already talked about this morning, *Chevron v. NRDC*. The two-step process laid out in that case reflects the Court's and Justice Stevens's acknowledgement that the Judicial Branch plays a critical role in the area of statutory interpretation, but that the Court must defer to the Legislative Branch when its intent is clear and to the Executive Branch when its interpretation of a statute it is entitled to administer is reasonable.<sup>43</sup> At the heart of *Chevron* is respect for the expertise and views of the other branches of government and the recognition that they must reconcile conflicting policies and accommodate competing interests.

This view of the Executive Branch and acknowledgment of the difficult position that its employees often occupy are evident in Justice Stevens's prosecutorial ethics jurisprudence. In *Agurs* and *Strickler v. Greene*, another prosecutorial misconduct case, Justice Stevens went out of his way to recognize the important role prosecutors play in our system and the value of their zealous advocacy.<sup>44</sup>

The final attribute that I want to emphasize today is Justice Stevens's concern with the integrity, both real and perceived, of the process by which democratic decisions are made. That concern was at the forefront most recently in his opinions in *Citizens United* and *McConnell v. FEC*, where he argued forcefully in favor of the constitutionality of campaign finance laws because, among other things, the laws combat corruption and the appearance of corruption in the electoral process.<sup>45</sup> A similar interest, I think, was at stake in Justice Stevens's

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43. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

44. See *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *United States v. Agurs*, 427 U.S. 97, 110–11 (1976).

45. See *Citizens United v. FEC*, 130 S. Ct. 876, 947 (2010) (Stevens, J., concurring in part and dissenting in part); *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003).

majority opinion in *Crawford v. Marion County Board*, in which the Court concluded that Indiana's voter identification law was constitutional.<sup>46</sup> And in the three cases I talked about earlier—*Agurs*, *Bagley*, and *Kyles*—Justice Stevens likewise focused on safeguarding the integrity of the trial process's truth-seeking function. Justice Stevens's jurisprudence reflects a belief that prosecutorial abuse, even though, in his words, "extremely rare,"<sup>47</sup> should not go unchecked when it does occur.

As I hope these cases demonstrate, Justice Stevens's jurisprudence provides a remarkable legacy, regardless of whether one agrees with his views in a given case. In conclusion, Justice Stevens, I'd like to thank you and the members of *The Georgetown Law Journal* for providing me with the opportunity to talk about just one aspect of this legacy. And Justice Stevens, I'd like to thank you, in particular, for bearing with me today when there's no red light on. I wish you the best of luck in your new phase of life. Thank you for everything you've done for our Court and our nation.

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46. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008).

47. *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J., concurring) ("[C]ases in which the record reveals so many instances of of the state's failure to disclose exculpatory evidence are extremely rare.").